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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-993

MARGARET LOVISI,

Petitioner

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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OPINIONS BELOW

The Supreme Court of Appeals wrote no opinion in affirming the judgment of conviction by denying a writ of error. The trial judge's oral opinion denying the motion to set the verdict of the jury aside as being contrary to the law and the evidence is not reported.

JURISDICTION

1. The Supreme Court of Appeals denied review on November 8, 1971.

2. The federal question was raised as shown below.

3. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

Whether or not the Virginia statute prohibiting sodomy is unconstitutional pursuant to the First, Fourth, and Fourteenth

Amendments to the United States Constitution, when applied to consenting adults in the privacy of a private home.

Was the seizure of a photo allegedly showing the petitioner in an act of sodomy in violation of her right to lawfully possess such material in the privacy of her own home?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First, Fourth, and Fourteenth Amendments to the Constitution of the United States are sufficiently familiar as not to require quotation.

STATEMENT

The petitioner was arrested on a felony warrant alleging a violation of Section 18.1-212 of the Code of Virginia, 1950, as amended, which is the general section prohibiting the act of sodomy in the State of Virginia. The petitioner was tried before a trial judge and jury and was convicted of the charge and received the maximum punishment under the statute which was three years in the state penitentiary. The petitioner did not testify on her own behalf, however, evidence was presented on behalf of the petitioner. The evidence against the petitioner consisted of a polaroid photo, the date of the taking of which was in conflict, testimony of the male individual who was also charged with sodomy, but who had been tried in a different trial, and testimony of the petitioner's daughter. The polaroid photo which had been seized in a search of the petitioner's residence was alleged to have been taken by the petitioner's daughter, although the state's own witness, the male involved in the photo, stated that the photo was taken with a self-timing device. Final sentencing of the petitioner in accordance with the verdict of the jury took place on September 11, 1970. At the conclusion of the evidence for the state, the petitioner moved to strike the evidence, which motion was overruled. After the jury returned with its verdict the petitioner moved to have the verdict set aside as being contrary to the law and evidence, and on September 11, 1970, this motion was overruled.

The petitioner then made application to the Supreme Court of Appeals, Virginia's highest Court, for a writ of error which was denied: "... the Court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Circuit Court."

HOW THE FEDERAL QUESTION WAS RAISED

1. Several times during the trial the petitioner raised the fact that the statute that the state was proceeding under was unconstitutional.

2. The same contention of violation of the petitioner's constitutional rights was argued in the motion to strike the evidence of the Commonwealth and also in the motion to set aside the verdict of the jury as being contrary to the law and the evidence.

3. It was repeated in the Petition for Writ of Error, filed by the petitioner, seeking review of her conviction by the Commonwealth's highest court.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that Section 18.1-212 of the Code of Virginia, 1950, as amended, is unconstitutional both under the Virginia and the United States Constitution. The section reads as follows:

> "If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.
>
> "If any person shall by force carnally know any male or female person by the anus or by or with the mouth he

or she shall be guilty of a felony and shall be confined in the penitentiary not less than three nor more than ten years."

Since the indictment did not allege any force being used it was incumbent upon the Commonwealth to rely upon the first paragraph of the statute. It is submitted that the statute is overbroad, vague, and an invasion of privacy, all in violation of the Virginia Constitution and the United States Constitution.

The case of *Buchanan* v. *Batchelor*, 308 F. Supp 729 (D.C. Tex. 1970) went into the Texas sodomy statute which is found at Article 524 of the Texas Penal Code and reads as follows:

"Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years."

The Buchanan case goes on to state that Article 524 makes no distinction whether acts it described as sodomy are committed homosexually, or whether by married or unmarried persons. Indeed it plainly appears that Article 524 applies to private consensual acts between married persons and private acts of sodomy between homosexuals.

Buchanan went on to hold at page 735, "In conclusion, Article 524 is void on its face for unconstitutional overbreadth insofar as it reaches the private consensual acts of married couples."

The case of *Cotner* v. *Henry*, 394 F. 2d 873 (7th Cir. 1968) involved the Indiana sodomy statute cited at Burns Ind. Stat. Ch. 169 Sec. 10-4221, which reads as follows:

"Whoever commits the abominable and detestable crime against nature with mankind or beast, or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution, shall be deemed guilty of sodomy and, on conviction, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) to which may be added imprisonment in the state prison not less than two (2) nor more than fourteen (14) years."

The Cotner case went on to cite the case of *Groswold* v. *State*, 381 U.S. 479, 85 S.Ct. 1678 and said: "In Groswold the Supreme Court recognized a constitutional right to marital privacy and held that the right is violated by the imposition of criminal sanctions for the use of birth control devices by married couples. The import of the Griswold decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty."

Of considerable importance is the fact that the American Law Institute Model Penal Code adopts the view that consensual private sexual conduct between adults should not ordinarily be subject to criminal sanction. Illinois, as well as many other states, has adopted this approach, although Indiana has not as yet joined the trend.

So we can see that the trend under the Model Penal Code would be any act between consenting adults, whether married or not, or whether performed heterosexual or homosexual.

While it is true in the instant case that the petitioner is not charged with a violation involving her husband, the record does indicate that her husband was present and apparently condoned, if not aided, the alleged act.

The trial judge seemed concerned with the allegation that the petitioner's children were present and witnessed the act, however, the answer to this is that the solution is not to charge the participants with sodomy but if desired, with an offense

against the children.

Without setting up some standards or guidelines, the Virginia statute would appear to be void, vague and overbroad, and should be declared void on its face.

The additional problem that the petitioner faced was the introduction into evidence of a polaroid photo which apparently depicted the petitioner in an act of sodomy. This photo was seized, along with numerous other items such as a coin collection, letters, other photos and films, and many books and magazines, from the private residence of the petitioner which was invaded by the Virginia Beach police armed with a search warrant to search for "pornographic literature, and/or pictures."

It is respectfully submitted that once this photo was admitted into evidence and displayed to the jury that the petitioner could not in any way have received a fair and impartial trial. It is submitted that in order to introduce what was purportedly an obscene photo that the burden then shifts to the state to affirmatively show to the trial court how it came into possession of the photo and whether or not a prior adversary hearing had been held prior to the seizure of the material. This is so since possession of this photo by the petitioner is not illegal per se. *Stanley* v. *Georgia*, 394 U.S. 557, 89 S.Ct. 1243 (1969). This Honorable Court has been quite vigilant in upholding the Fourteenth Amendment's requirement that regulation by the states of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. See, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 83 S.Ct. 631, (1963). This Court has spelled out rather clearly that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. See also, *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205, 84 S.Ct. 1723 (1964).

The introduction of this photo denied the petitioner of the right to due process under the law.

CONCLUSION

For the foregoing reasons, we respectfully submit this petition for a writ of certiorari should be granted.

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